

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUTILIO GARCIA-SANCHEZ,

Defendant-Appellant.

No. 00-30125

D.C. No.

CR-96-00213-RHW

OPINION

Appeal from the United States District Court
for the Eastern District of Washington (Spokane)
Robert H. Whaley, District Judge, Presiding

Submitted November 21, 2000¹

Filed January 23, 2001

Before: Alfred T. Goodwin, Thomas M. Reavley,² and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge Goodwin

Criminal Law and Procedure/Sentencing

The court of appeals affirmed a judgment of the district
court. The court held that a new trial with new jury instruc-

¹ The panel unanimously finds this case suitable for decision without
oral argument. Fed. R. App. P. 34(a)(2).

² Honorable Thomas M. Reavley, Senior United States Circuit Judge for
the Fifth Circuit, sitting by designation.

COUNSEL

Lana C. Glenn, Spokane, Washington, for the defendant-appellant.

Timothy J. Ohms, Assistant United States Attorney, Spokane, Washington, for the plaintiff-appellee.

OPINION

GOODWIN, Circuit Judge:

Garcia-Sanchez was convicted of conspiracy to distribute more than five kilograms of cocaine in violation of 21 U.S.C.

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§ 846 and sentenced to 121 months in prison. He previously appealed both his conviction and sentence. We affirmed the conviction but reversed and remanded for resentencing. See United States v. Garcia-Sanchez, 189 F. 3d 1143 (9th Cir. 1999). In this second appeal following resentencing, Garcia-Sanchez asserts that the district court erred, on remand, in attributing to him the amount of drugs sold by the conspiracy, and other sentencing errors. We affirm.

At sentencing, the court heard testimony of three government witnesses plus that of Garcia-Sanchez on the drug sales operation based in the trailer of Lawrence Bertolino. The government introduced substantial evidence, which was subject to cross examination. The district court found more than enough evidence of Garcia-Sanchez's participation and of the volume of sales necessary to support the original sentence, and reimposed that sentence after a full evidentiary hearing and full review of the relevant sentencing guidelines.

The sentencing court gave the defendant the benefit of every doubt, and reduced the arithmetical numbers in his favor by twenty percent in order to take into account any possible defects in the memory of the witnesses. Even with the reduction, there was more than enough evidence to support the maximum guideline sentence, yet the district court imposed a sentence at the lower end of the guideline. There was no error in the fact-finding process by which the court calculated the volume of the drug trafficking in which the defendant participated.

On the legal issues, the second appeal attempts to reargue a point that we rejected on the merits in the first appeal and that is barred now by res judicata. The opinion in the first appeal affirmed the conviction and the sentencing court's denial, on the merits, of the defendant's claim that he was a minor participant. See Garcia-Sanchez, 189 F.3d at 1150. As a matter of fact, next to the ring leader of the conspiracy, this

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defendant was as important a functionary in the whole enterprise as anyone connected with it.

Finally, the second appeal seeks an initial review and decision on whether the minimum guideline sentence, which exceeded the ten year mandatory statutory minimum by one month, requires a new trial with new jury instructions, according to the defendant's reading of Apprendi v. New Jersey, _____ U.S. _____, 120 S. Ct. 2348 (2000). While this question was not presented to the district court, Apprendi has no application here. Apprendi dealt with the consideration of facts in sentencing enhancement beyond the statutory maximum. In the instant case, the sentence imposed was nine years and eleven months below the statutory maximum.

AFFIRMED.

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